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In the
Supreme Court of the United States

OCTOBER TERM, 1961

No. 783

RAILWAY EXPRESS AGENCY, INCORPORATED,

Petitioner,

vs.

JACKSONVILLE TERMINAL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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OPINIONS BELOW

The Judgment in the United States District Court for the Southern District of Florida, Jacksonville Division, is not reported, it is correctly set forth in the transcript of Record (R-341). The Opinion and Judgment of the United States Court of Appeals, Fifth Circuit, rendered November 17, 1961, is reported in 296 F.2d pages 256 to 264, inclusive (Adv. Sheet #3). Rehearing was denied on January 11th, 1962

JURISDICTION

Petitioner invokes jurisdiction of the Supreme Court of The United States under provisions of 28 U.S. Code, §1254 (1) and Rule 19 1 (a), Rules of the United States Supreme Court. Since the judgment sought to be reviewed is not where a State Court has decided a Federal question, Rule 19 1(a), *supra*, is not applicable. It is possible that petitioner intended Rule 19 1(b).

Petitioner contends that the Court of Appeals has (a) deprived petitioner of its property without due process of law, and (b) has decided an important state question in a way in conflict with applicable State Law.

We respectfully submit that it affirmatively appears (1) that petitioner was duly and regularly served with process, filed its defensive pleadings, participated in the trial of the issues presented, and that the decision of the Court of Appeals is in accordance with the essential requirements of the Law; and (2) that there is no conflict between the decision of the Court of Appeals and applicable State Law.

QUESTIONS PRESENTED

I

DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT THE SEVERAL COVENANTS OF THE LEASE BETWEEN THE PARTIES WERE INDEPENDENT COVENANTS, AND THAT BREACH OF ONE IS NOT A DEFENSE TO A SUIT ON ANOTHER.

THIS QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

II

WHEN NO CONFLICT EXISTS WITH APPLICABLE STATE LAW, SHOULD A REQUEST BE MADE FOR A DECISION ON STATE LAW BY THE SUPREME COURT OF FLORIDA?

THIS QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

STATEMENT

Suit by respondent, Jacksonville Terminal Company, against petitioner, Railway Express Agency was based on a Lease Agreement between the parties dated the 5th day of May 1926 (plaintiff's Exhibit #1). This Lease was extended by agreement dated February 28th, 1954 (Plaintiff's Exhibit #2). In the original Lease, paragraph 5, respondent agreed to construct and maintain the tracks on the leased premises according to its standard. Paragraph 9 of this Lease requires petitioner to "..... fully indemnify and save harmless the Terminal Company ....., from and against all charges, expenses, loss, damage, injuries, suits or judgments, arising by reason of or in connection with occupation and use of the premises ....."

C. C. Johnson, an employee of the respondent, Jacksonville Terminal Company, was injured while performing a switching movement on the leased premises. Terminal Company sued for recovery of its expenses, suits and judgments resulting from Johnson's injury in the undisputed amount of $68,062.62.

Petitioner, Railway Express Agency, contended (a) that respondent had breached its agreement to maintain the tracks in accordance with its standard and (b) the indemnity agreement should not protect respondent from its own negligence.

The questions were submitted to a jury, which found for petitioner. The Court of Appeals reversed the judgment and directed that judgment should be entered for respondent for recovery of the $68,062.62.

ARGUMENT

QUESTION I

DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT THE SEVERAL COVENANTS OF THE LEASE BETWEEN THE PARTIES WERE INDEPENDENT COVENANTS, AND THAT BREACH OF ONE IS NOT A DEFENSE TO A SUIT ON ANOTHER.

THIS QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

Petitioner contends that by being deprived of the defense that respondent breached paragraph 5 of the Lease, deprives petitioner of its property without due process of Law.

The Court of Appeals found and held that paragraph 5 and paragraph 9 of the lease are independent covenants.

When promises are independent of each other, each party must perform on his part when time for performance arrives, irrespective of whether the other party has performed his obligation. *14 Am. Jur., Covenants, Conditions and Restrictions.* § 10. The rule seems to be well settled that when covenants on the part of different parties to a contract are to be performed at different times. . . . . or when a covenant goes only to a part of the consideration on both sides and a breach of the covenant may be compensated in damages and will not defeat the purpose of the contract, the covenant is

independent. *Zanbetti v. Commodores Land Co.* 102 Fla. 586, 136 So. 644.

Since the covenant to make repairs is necessarily a continuous one and which necessarily depends upon a state of ill repair, such a covenant would seem to fit perfectly within this definition. And such was the holding in *Houston & Texas Central R. Co. v. Diamond Press Brick Co.*, 111 Texas 18, 222 S.W. 204, 20 A.L.R. 2d 725. In that case one clause in the agreement between the parties provided that the railroad company should bear the expense of keeping the spur track in good condition, while another provision obligated the industry to save the railroad harmless from any and all claims for damages arising from any cause whatsoever growing out of the construction, maintenance and operation of the spur track. A third person recovered judgment against the railroad for personal injuries sustained by him which were caused by the railroad's negligence in permitting the spur track crossing to become unsafe. The Court held that the indemnity agreement was not nullified because of the contractual obligation of the railroad to bear the expense of keeping the spur track in good condition, the Court stating that the two provisions were not inconsistent with each other, and that the contract, as a whole, simply meant that the expense of keeping the spur in good condition was to be borne by the railroad but that the industry was to hold the railroad harmless against claims for damages founded upon any negligent condition in the maintenance of the track.

The Court of Appeals added (p.263) "This is familiar and settled Law, and the point requires no elaboration here."

Petitioner was certainly subject to the jurisdiction of the Court, and the question of Law was decided in accordance

with the essential requirements of the Law. It does not appear that there has been a violation of petitioner's constitutional rights.

QUESTION II

WHEN NO CONFLICT EXISTS WITH APPLICABLE STATE LAW, SHOULD A REQUEST BE MADE FOR A DECISION ON STATE LAW BY THE SUPREME COURT OF FLORIDA.

THIS QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

The indemnity clause reads as follows:

"Inasmuch as the station facilities are operated and maintained for the joint and common use of all Railway Companies using the Jacksonville Terminal Company's station and property, it is hereby expressly stipulated that the said *Express Company will fully indemnify and save harmless the said Terminal Company and the Railway Companies* using the Terminal Company's station and property *from and against all* charges, expenses, loss, damage, injuries, *suits or judgments, arising* by reason of *or in connection with* occupation and use of the premises of the Terminal Company by the Express Company under this agreement, whether to property of, or persons of, the Terminal Company or the railway companies hereinbefore mentioned, or to third persons or property of third persons not parties hereto, ..."

Petitioner contends that the indemnity clause excludes any recovery resulting from respondent's negligence, and that the phrase "by reason of or in connection with" must be construed to be a *causal connection.*

This is not in accordance with Florida Law.

According to our dictionaries the phrase "in connection with" is synonymous with the phrase "related to." A causal connection is only one kind of connection. Attributing the normal meaning to the words used in the indemnity clause it is error to say that Johnson's judgment and the appellant Terminal Company's loss and expenses are unconnected with or unrelated to the petitioner Express Company's occupation and use of the premises.

The Florida Supreme Court interpreted the phrase "in connection with" in *J. Ray Arnold Corporation of Olustee v. Richardson*, 141 So. 133, 105 Fla. 204, in which the Court cited with approval *Gurney v. Atlantic Etc. Ry Co.* 58 N.Y. 358:

"'The words, 'in connection with that company's railways' as used in relation they bear to the whole clause, are the equivalent of 'in the interest and upon the employment of that company in and about its railways and the operation and management thereof, and growing out of the proper and legitimate business of the company as the possessor and operator of such railways' ".

The parties to this contract did not choose to express themselves in terms of causation, they expressed themselves in terms of effect – a loss, a judgment or expenses in connection with the use or occupancy of the premises. The railroad tracks in the Express yard leased by respondent to petitioner, pursuant to the contract, were constructed, maintained and operated by respondent for the account and at the cost of petitioner. The indemnity clause would have no meaning if the use and occupancy of the premises by petitioner must have a causal connection to any judgment, loss or expense suffered by the respondent. If the phrase is to be given that meaning, the only loss caused by petitioner's occupancy of the premises would be the loss of use by respondent.

A Florida contract was construed according to Florida law in the case of *Ringling Brothers-Barnum & Bailey Combined Shows, Inc. v. Olvera*, 1941, C.C.A. 9th C., 119 F 2d, 584. This is the only case arising under Florida law where it is contended that the ommission of the word "negligence" prevents the contract from protecting against the contracting parties' own negligence. In the Ringling Brothers case the Court say, page 586, headnote (5).

> "It will be noted that negligence is not mentioned as an excepted liability. Appellees claim the provision is so broad that it cannot be deemed to exempt the appellants from any sort of liability. There is not cited, nor are we able to find, any Florida case construing such a provision. However, the common law prevails in Florida. The United States Supreme Court, in determining the common law with regards to such agreements . . . . . , has held that, though negligence is not mentioned in the exempting clauses, such broad provisions going to the essence of liability as 'all risk or loss of damage', 'at consignee's risk of loss and damage', 'all risk of accident to person and baggage', and 'no obligation or risk in case of accident or damage to men and supplies' relieve from liability for ordinary negligence a railroad company contracting in its private and not public service capacity. *Santa Fe Ry v. Grant Bros Constr. Co.*, 228 U.S. 177, 188-194, 33 S. Ct. 474, 478, 57 L. Ed. 787.
>
> "In Florida prevails an almost complete survival of in the eyes of the law, before the Courts stand upon the common law freedom of contract. It is clearly inferable from language of the Florida Supreme Court in *A. C. L. Ry v. Beazley*, 54 Fla. 311, 45 So. 761, 770, 787 that Florida has no public policy against contracts

> exempting railways from liability for negligence even to their railway employees, apart from a specific statute, that Court stating: 'All parties litigant who are sui juris, whether railroad corporations or their employees, an equal footing, entitled to equal rights and protection, and none to special privileges . . . . . It may well be that plaintiff made a rather hard bargain with defendant; but with that we have nothing to do, so long as no fraud or deception was practiced and the contract was legal in all respects."

The indemnity clause contains words "*fully* indemnify and save harmless", and "from and against *all* charges, expenses, loss, damage, injuries, suits or judgments". Words quite as broad and inclusive as those cited by the United States Supreme Court in the *Santa Fe Ry* case, supra.

Such an exception from liability will not be permitted to a railroad in its public service capacity. But the lease agreement between respondent and petitioner involved in this case is in a private, not a public capacity. Neither would such an exception be allowed if the parties were not on an equal footing. No one can truthfully say that the Railway Express Agency can not contract on an equal footing with Jacksonville Terminal Company. Furthermore, such a broad exception from liability will not be given force and effect in states where it is against public policy. There is no such public policy in the State of Florida. *Russell v Martin* (Fla., 1956) 88 So. 2d 315; *Inland Container Corporation v A.C.L. Ry*, 266 F 2d 857; *Thomas v. A.C.L. Ry Co.*, 201 F 2d 167.

That brings us to the question, did the parties mean what they said? In the absence of infringement of public policy, which is not present in this case, the words of the indemnity

clause should be given their normal, ordinary and usual meaning. The normal, ordinary meaning of the indemnity clause includes *full* indemnity for *all* charges, judgments, etc. There is no limitation. There is no exception. The meaning of the clause includes negligence of respondent.

There is no reason for the Court to apply rules of construction, or to apply to the words of the indemnity clause restricted or artificial definitions. Rules of construction are aids to interpretations of contracts when the meaning of the words used is not clear. Rules of construction are not employed to determine the meaning of a contract which is unambiguous. Neither are rules of construction used to create an ambiguity, nor is extrinsic evidence admissible to vary the terms of an unambiguous contract. See *McGhee Interests, Inc. v. Alexander National Bank*, 102 Fla. 140, 135 So. 545, 547, in which the Supreme Court of Florida say:

> "Ambiguities should arise from the words used in a contract before this Court may resort to interpretation or construction to ascertain the intention of the parties to it. In other words, ambiguity must exist in the contract, not outside of it."

On the contrary, the District Court in denying the respondents motions after judgment, cited as its authority, *Batson-Cook Company v. Industrial Steel Erectors*, 257 F. 2d 410, (R346) a case decided in an Alabama district, according to Alabama law.

Petitioner contends that the decision of the Court of Appeals in the instant case is in conflict with *Jackson, et al v. Florida Weathermakers*, 55 So. 2d 575. The record does not sustain this contention. The agreement in this case provides for the petitioner to "..... *fully* indemnify and save harmless

the said Terminal Company ..... from and against *all* charges, expenses, loss, damage, injuries, suits or judgments, arising by reason of or in connection with occupation and use of the premises ....." The agreement in the Jackson case provided that the contractor, Florida Weathermakers, should procure "public liability insurance". There is *no* similarity in the contractual obligation of the parties in the two cases. It is a matter of common knowledge and business experience that public liability insurance does not generally protect third parties from their own acts of negligence. Public liability insurance issued to Florida Weathermakers would protect it from its own negligence; but public liability insurance to Florida Weathermakers would not protect Jackson from acts of his own negligence.

On the other hand, petitioner agreed to "*fully* indemnify and save harmless" the respondent from and against *all* charges, expenses, loss, damage, injuries, suits or judgments arising by reason of or in connection with occupation and use of the premises .....". This indemnity clause is inclusive and without exception.

In the *Jackson* case, supra, protection from negligence by Jackson is clearly excluded, and not intended.

In the instant case protection from negligence by respondent is clearly included and intended, if the words of the agreement are to be given their usual and ordinary meaning, as indeed they must. *McGhee Interests, Inc. v. Alexander National Bank, supra.*

It is interesting to note *Clay v. Sun Insurance Office*, 363, U. S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170, cited by petitioner as authority that the question of whether or not the indemnity clause included or excluded negligence of respondent should have been referred to Florida Supreme Court for a decision. In

that case the Supreme Court of the United States held that as a matter of Florida law "..... an insurance policy providing coverage against *'all* risks' of loss or damage to the property covered, protect the insured against destruction and loss of the property caused by his wife, *where the policy does not intimate any exception to its coverage for such a risk* ....." Id., head note 6, page 1172.

The principles of law on which this case was decided by the Court of Appeals are well established in Florida.

There was no reason for the Court of Appeals to certify a question to the Florida Supreme Court for a decision.

CONCLUSION

Respondent respectfully submits that the record does not sustain petitioner's contention that its property is taken without due process of law, or that the Court of Appeals decided the case in conflict with Florida decisions. While petitioner anxiously seeks a review by this Court it has failed to make it appear that there are any special or important reasons for granting certiorari in this case.

We respectfully submit that the petition should be denied.

Respectfully submitted,

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I HEREBY CERTIFY that I have this day served the foregoing brief upon petitioner's Attorneys of record in this proceeding, by mailing a copy thereof properly addressed to each such Attorney as required by the Rules of Practice.

DATED at Jacksonville, Florida, this ..... day of April, A. D. 1962.

Elliott Adams
Attorney for Respondent